No. 14-361

In the Supreme Court of the United States

SAMUEL OCASIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association working on behalf of criminal defense attorneys to promote justice and due process for those accused of crime or misconduct.[1]

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 including affiliates' membership. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in the ABA House of Delegates.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice and files numerous *amicus* briefs each year in this Court and other federal and state courts, addressing issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored any part of the brief, and no person or entity, other than *amicus* or its counsel, made a monetary contribution to the preparation or submission of this brief. The parties' consents to the filing of this brief are on file with the Clerk's office.

NACDL has a particular interest in this case because the Hobbs Act, as interpreted by the federal government and some courts, has been transformed into a vague, expansive criminal statute with draconian penalties. These broad interpretations provide little notice of the conduct supposedly criminalized and give prosecutors far too much discretion to decide whom to punish. This case provides the Court with an opportunity to begin to restore the Hobbs Act to the limited scope enacted by Congress.

SUMMARY OF ARGUMENT

The question in this case is whether the Hobbs Act offense of conspiracy to commit extortion encompasses an agreement to obtain property through extortion from one of the alleged conspirators, even though the statute defines "extortion" as "the obtaining of property *from another*." 18 U.S.C. § 1951(b)(2) (emphasis added).

Petitioner explains in detail why the statutory text and structure preclude the government's expansive interpretation of the statute. This *amicus* brief explains why two fundamental principles governing construction of federal criminal laws require the same result.

This Court has made clear that the conduct proscribed by a criminal law must be defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). The government's position in this case plainly violates that principle—the reference to "from another" is at the minimum ambiguous, and the statute therefore must be construed to require proof that property was obtained from a non-conspirator. Failure to adhere to that principle

here produces all of the adverse consequences that the due process rule is designed to prevent: lack of clarity regarding the scope of criminal liability; definition of a criminal offense by courts rather than Congress; and expansion in the unreviewable discretion exercised by prosecutors.

Federal criminal laws also must be interpreted with appropriate regard for principles of federalism—the Court will not construe federal law to encompass matters traditionally addressed by state law absent a clear indication that Congress intended that result. The government's expansive view of the Hobbs Act conspiracy offense would reach any individual alleged to have bribed any state or local official, and impose a sentence of up to twenty years in prison. Bribery of government officials is criminalized by the laws of every State, and is obviously a matter of significant local concern. Interpreting the Hobbs Act so broadly would plainly upset the federal-state balance—and there is no evidence that Congress intended that result. This principle, too, requires rejection of the government's position.

ARGUMENT

A HOBBS ACT CONSPIRACY CHARGE REQUIRES PROOF OF AN AGREEMENT TO OBTAIN PROPERTY FROM A THIRD PARTY.

The Hobbs Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). Petitioner demonstrates that the statute's plain language—requiring "the obtaining of property *from another*"—means that a Hobbs Act conspiracy charge cannot be satisfied by proof of an

agreement to obtain property from one of the conspirators. Pet. Br. 20-42.

The government's position, that "another" can be interpreted to include individuals who are members of the alleged conspiracy, is yet another example of what have become all-too-familiar phenomena. *First*, broadening of criminal offenses beyond the bounds set by unambiguous statutory text, with the concomitant expansion in the essentially unreviewable discretion exercised by federal prosecutors. *Second*, intrusion of federal criminal law into areas long reserved to the States without clear authorization by Congress. In deciding this case, the Court should make clear that lower courts—and prosecutors making charging decisions—must construe federal criminal laws in a manner that prevents, rather than produces, these illegitimate consequences.

A. The Unambiguous Meaning Of The Text Enacted By Congress Delineates The Outer Bounds Of The Hobbs Act Offense.

The principle that the scope of a criminal offense is limited to the reach of its unambiguous plain language is rooted in fundamental constitutional principles. "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited." *United States* v. *Williams*, 553 U.S. 285, 304 (2008); see also *Skilling* v. *United States*, 561 U.S. 358, 402 (2010) (criminal offense must be defined "'with sufficient definiteness that ordinary people can understand what conduct is prohibited'") (quoting *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983)).

Statutory language that is ambiguous by definition cannot provide the requisite fair notice. "Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another." *Connally* v. *General Constr. Co.*, 269 U.S. 385, 393 (1926). For that reason, the Court follows "the rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Yates* v. *United States*, 135 S. Ct. 1074, 1088 (2015) (quoting *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000)); see also *Liparota* v. *United States*, 471 U.S. 419, 427 (1985) ("[a]pplication of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal").

Providing fair notice of conduct that is criminal is the principal reason why a criminal offense is limited to the acts unambiguously encompassed within the statutory language, but this principle serves other important purposes as well—"strik[ing] the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota*, 471 U.S. at 427.

"Federal crimes are defined by Congress, not the courts." *United States* v. *Lanier*, 520 U.S. 259, 267 n.6 (1997); see also *United States* v. *Bass*, 404 U.S. 336, 348 (1971) ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."); *United States* v. *Evans*, 333 U.S. 483, 486 (1948) (in the federal system, "defining crimes and fixing penalties are legislative, not judi-

cial, functions"). Imposing criminal liability based on ambiguous statutory text carries the significant risk of exceeding the bounds authorized by Congress.

Moreover, expanding the scope of criminal liability based on ambiguous statutory language opens the door to "'arbitrary and discriminatory enforcement.'" *Skilling*, 561 U.S. at 402-03 (quoting *Kolender*, 461 U.S. at 357). It would "allow[] policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358 (quotation marks omitted).

Prosecutors in particular exercise broad unreviewable discretion with respect to their charging decisions. E.g., *Heckler* v. *Chaney*, 470 U.S. 821, 828-38 (1985). The only practically effective limits on that discretion—because the overwhelming number of criminal cases are resolved through plea bargains—are the constraints imposed by statutory definitions of criminal offenses.

Justice Scalia recognized this reality during the *Yates* oral argument earlier this Term:

> [I]f * * * the Justice Department's position [is to charge the most serious offense possible], then we're going to have to be much more careful about how extensive statutes are. I mean, if you're saying we're always going to prosecute the most severe, I'm going to be very careful about how severe I make statutes.

11/5/14 Tr. 28-29, at 2014 WL 7661639; cf. *United States* v. *Stevens*, 559 U.S. 460, 480 (2010) (declining to "uphold an unconstitutional statute merely because the Government promised to use it responsibly").

The Court has in recent years been required to rein in a number of attempts by the government to expand the scope of criminal liability beyond a statute's plain language. *Yates*, 135 S. Ct at 1088 ("In determining the meaning of 'tangible object' in [18 U.S.C.] § 1519. 'it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'"); *Burrage* v. *United States*, 134 S. Ct. 881, 887, 892 (2014) (interpreting statute imposing mandatory minimum sentence when "death or serious bodily injury results from the use of [a controlled] substance" to require proof that prohibited conduct was a but-for cause of death, rather than a contributing cause, because the latter construction "cannot be squared * * * with the need to express criminal laws in terms ordinary persons can comprehend") (quotation marks omitted); *Skilling*, 561 U.S. at 402, 411 (holding that statute criminalizing "a scheme or artifice to deprive another of the intangible right of honest services" "does not encompass conduct more wide-ranging than the paradigmatic cases of bribes and kickbacks"—and rejecting the government's more expansive interpretation—"absent Congress' clear instruction otherwise") (quotation marks omitted); *Carr* v. *United States*, 560 U.S. 438, 441-58 (2010) (plain text of statute precludes government's interpretation that sex-offender registration statute criminalizes pre-enactment interstate travel); *Cleveland*, 531 U.S. at 25 ("property" in mail fraud statute does not include state license because "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'"); cf. *Mellouli* v. *Lynch*, 2015 WL 2464047, at *9 (2015) (state drug paraphernalia conviction does not require alien's removal

because it does not qualify as a conviction under a law "relating to a controlled substance").

Here too, the court of appeals failed to adhere to this basic interpretive principle when it upheld the government's expansive construction of the Hobbs Act.

The statute defines "extortion" as "the obtaining of property from another, with his consent * * * under color of official right." 18 U.S.C. § 1951(b)(2). The substantive offense therefore plainly does not extend to individuals alleged to have paid a bribe. *Evans* v. *United States*, 504 U.S. 255, 260 (1992) ("At common law, extortion was an offense committed by a public official who took 'by colour of his office' money that was not due to him for the performance of his official duties.").

The statutory language also imposes criminal liability on persons who "conspire[] to do so" (18 U.S.C. § 1951(a))—in other words, who conspire to commit "extortion." But that authorization of conspiracy liability does not override the extortion offense's requirement that the property be obtained "from another"—from a third party. See *Sekhar* v. *United States*, 133 S. Ct. 2720, 2725 (2013) ("[o]btaining property" in the Hobbs Act "requires that the victim 'part with' his property, * * * and that the extortionist 'gain possession' of it").

Even if "from another" were ambiguous in the context of the conspiracy offense, the requirement of fair notice and the rule of lenity would require that the statute be given the less expansive interpretation. The provision accordingly must be interpreted to permit a conspiracy offense only when property is

obtained, or sought to be obtained, from an individual who is not a member of the alleged conspiracy.

Indeed, application of these principles is particularly important in the context of conspiracy offenses, because conspiracy statutes pose a special risk to individual liberties. Justice Jackson famously warned that the "federal law of conspiracy" was an

> elastic, sprawling and pervasive offense. Its history exemplifies the tendency of a principle to expand itself to the limit of its logic. The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.

Krulewitch v. *United States*, 336 U.S. 440, 445-46 (1949) (Jackson, J., concurring in judgment) (quotation marks and footnotes omitted). Adopting Justice Jackson's framework, the Court subsequently stated that "cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald* v. *United States*, 353 U.S. 391, 404 (1957). The "[t]oo easy abuses to which a charge of conspiracy may be put" give special weight to applying the rule of lenity in this context. *Von Moltke* v. *Gillies*, 332 U.S. 708, 727 (1948) (opinion of Frankfurter, J.)

The court below compounded its failure to adhere to these basic principles for interpreting criminal statutes by devising its own, extra-statutory, limitation on the scope of the conspiracy offense. The court

held, in *United States* v. *Spitler*, 800 F.2d 1267 (4th Cir. 1986), that a conspiracy offense will lie when the individual who "part[s] with" the property "exhibits conduct more active than mere acquiescence" in making a payment—because "he or she may depart the realm of a victim and may unquestionably be subject to conviction for aiding and abetting and conspiracy." *Id.* at 1276. The court acknowledged that defining "the degree of activity necessary" to qualify as "a victimizer" was a significant question, but declined to "declare a bright line at which a payor's conduct constitutes sufficient activity beyond the mere acquiescence of a victim." *Id.* at 1277-78.

The lower court adhered to the same approach in the present case. Pet. App. 19a-25a. It again held that the person who parts with his or her property is subject to conspiracy liability only when he or she engages in "active solicitation and inducement"—but declined to define the parameters of that requirement. *Id.* at 20a-21a.

This case thus provides a paradigmatic example of the consequences that result when courts expand the scope of federal criminal liability beyond the scope permitted by a statute's unambiguous language, and then try to limit the damage by creating their own limitations on the reach of criminal liability. Not only is the requirement of fair notice eviscerated, but criminal liability turns on determinations made by judges rather than Congress.

This Court should reaffirm the principle that criminal liability is limited by the unambiguous meaning of the text enacted by Congress.

B. The Court Should Not Construe The Hobbs Act To Intrude Upon An Area Traditionally Reserved To State Law.

This Court has consistently rejected constructions of federal criminal statutes that would "render * * * 'traditionally local criminal conduct' * * * 'a matter for federal enforcement.'" *Jones* v. *United States*, 529 U.S. 848, 858 (2000) (quoting *Bass*, 404 U.S. at 350). "'[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." *Ibid.* (quoting *Bass*, 404 U.S. at 349).

The Court applies this principle because "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." *Bass*, 404 U.S. at 349. It therefore "insist[s] on a clear indication that Congress meant to reach purely local crimes, before interpreting [a] statute's expansive language in a way that intrudes on the police power of the States." *Bond* v. *United States*, 134 S. Ct. 2077, 2090 (2014).

In *Bass*, the Court refused to interpret the federal statute to criminalize "mere possession" of a firearm, because such an offense fell within the area of traditional state authority. 404 U.S. at 350. That expansive interpretation of the statute would "render[] traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources." *Ibid.*

The Court reached a similar conclusion in *Jones* with respect to the federal arson statute. Under the government's "expansive" interpretation, the Court observed, "hardly a building in the land would fall outside the federal statute's domain." *Jones*, 529 U.S.

at 857. Characterizing arson as "a paradigmatic common-law state crime," the Court rejected the interpretation of the statute that would change the federal-state balance by "mak[ing] virtually every arson in the country a federal offense." *Id.* at 858-59; accord, *Cleveland*, 531 U.S. at 24-27 (refusing to construe federal mail fraud statute to criminalize false statements on state license applications).

Just last Term, in *Bond* v. *United States*, 134 S. Ct. 2077 (2014), the Court again applied this basic principle of statutory construction. The criminal law at issue in that case made it an offense knowingly to "own, possess, or use, or threaten to use, any chemical weapon." 18 U. S. C. § 229(a)(1). The Court held that the statute did not encompass the use of chemicals to effect an assault motivated by the desire for vengeance arising out of a personal dispute. Under the government's broad interpretation of the statute, "'hardly' a poisoning 'in the land would fall outside the federal statute's domain.'" *Bond*, 134 S. Ct. at 2092 (quoting *Jones*, 529 U.S. at 857). After surveying its prior decisions in *Bass* and *Jones*, the Court refused to "transform the statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults" in the absence of a clear expression of congressional intent, because that result would "upset the Constitution's balance between national and local power." *Id.* at 2091-93.

The government's expansive construction of the Hobbs Act would produce exactly the same result. Every individual alleged to have bribed any government official would become subject to federal prosecution on a conspiracy charge—even though such an

individual concededly could *not* be charged with the substantive offense.

A divided Court held in *Evans* that a public official's *receipt* of a bribe constitutes "extortion" in violation of the Hobbs Act—even if the public official did not solicit or otherwise initiate the payment. 504 U.S. at 265-68; see also *id.* at 278-85 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting) (extortion requires proof of inducement and proof that payment was obtained under the pretense that the official was legally entitled to the payment).

The dissenting Members of the Court expressed concern that the Court's decision ratified an expansive interpretation of the Hobbs Act that had produced "a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws—acts of public corruption by state and local officials." *Evans*, 504 U.S. at 290. It was therefore "repugnant * * * to basic tenets of federalism." *Ibid.*

The construction of the Hobbs Act urged by the government in this case would intrude even further into state prerogatives. *Evans* did not extend federal criminal liability to the private party alleged to have paid a bribe. See 504 U.S. at 283 (dissenting opinion) ("Where extortion is at issue, the public official is the sole wrongdoer; because he acts 'under color of office,' the law regards the payor as an innocent victim and not an accomplice."); *McCormick* v. *United States*, 500 U.S. 257, 279 (1981) (Scalia, J., concurring) (extortion laws "punish[] * * * only the person receiving the payment," while bribery laws punish the person receiving the payment and "the person making it").

The government's theory here—interpreting the conspiracy offense created by the Hobbs Act to include a "conspiracy" between the person receiving the bribe and the person paying it—would expand the reach of federal criminal law to encompass those individuals. Any allegation of bribery of any state or local official could be charged as a Hobbs Act conspiracy.

In *Cleveland*, the Court refused to interpret the federal mail fraud statute to encompass false statements in connection with applications for a state gambling license on the ground that "[e]quating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities." 531 U.S. at 24. It held that recognizing a federal offense would "'significantly change[] the federal-state balance in the prosecution of crimes'" and that Congress had not clearly expressed its intent to do so. *Id.* at 25.

States obviously have well developed systems of laws criminalizing bribery of their public officials. A federal offense encompassing the very same conduct would intrude directly on an area of traditional state concern—punishing attempts to corrupt state and local officials. *Fischer* v. *United States*, 529 U.S. 667, 681 (2000) (refusing to construe federal anti-bribery statute broadly because "[d]oing so would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance").

There is no evidence that the Congress that enacted the Hobbs Act intended to confer upon federal prosecutors expansive authority to target anyone alleged to have bribed a state or local official.

The Hobbs Act was preceded by the Anti-Racketeering Act of 1934, which was enacted by Congress to impose federal criminal liability for the activities of violent criminal gangs. The House Committee on the Judiciary had "set forth without comment a letter from the Attorney General" explaining that "the purpose of the legislation is * * * to set up severe penalties for racketeering by violence, extortion, or coercion, which affects interstate commerce." *United States v. Local 807 of Int'l Bhd. of Teamsters*, 315 U.S. 521, 529-30 (1942). And one senator submitted a report referring to the Anti-Racketeering Act as one of several efforts to "render more difficult the activities of predatory criminal gangs of the Kelly and Dillinger types." *Id.* at 530.

The statute included an exemption for "bona fide labor activities" that this Court in *Local 807* interpreted to exempt all organized labor activities. 315 U.S. at 531.

Congress enacted the Hobbs Act to overrule this decision. *Evans*, 504 U.S. at 263. There is no evidence whatever that the Hobbs Act's inclusion of the term "extortion" and the addition of a conspiracy offense—neither of which was present in the Anti-Racketeering Act—were intended to expand federal law into areas traditionally reserved to the states, such as every alleged bribe of a state or local official.

Indeed, it is noteworthy that when Congress has legislated in this area, it has imposed limitations on the scope of federal criminal liability and imposed significantly lower penalties. See 18 U.S.C. § 666; Pet. Br. 25-26, 34.

This Court recently rejected a similar effort to adopt an overbroad construction of the Hobbs Act,

holding in *Sekhar* that the term "obtaining of property from another" did not encompass compelling an individual to recommend that his employer approve an investment because the recommendation did not constitute transferable property. 133 S. Ct. at 2725. Given the dramatic intrusion on traditional state law enforcement authority that would result from acceptance of the government's expansive construction of the statute, it should reject the government's position here as well.

The dissenters in *Evans* cautioned that "'[c]ourts must resist the[] temptation [to stretch criminal statutes] in the interest of the long-range preservation of limited and even-handed government.'" 504 U.S. at 295 (quoting *United States* v. *Mazzei*, 521 F.2d 639, 656 (3d Cir. 1975) (en banc) (Gibbons, J., dissenting)). The court below, and the government, fell victim to that temptation in this case. This Court should restore the Hobbs Act's conspiracy offense to the more limited scope enacted by Congress.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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